BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARTIN LEHNERT	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,054,305
TRAC-WORK INC.	)	
Respondent	)	
AND	)	
	)	
WAUSAU UNDERWRITERS INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the April 6, 2011, preliminary hearing Order of Administrative Law Judge Brad E. Avery (ALJ). Claimant was awarded benefits in the form of temporary total disability compensation (TTD) until the date of the independent medical examination (IME) ordered by the court. The ALJ ruled that claimant's accident and resulting injury arose out of and in the course of his employment with respondent.

Claimant appeared by his attorney, Michael J. Haight of Kansas City, Missouri. Respondent and its insurance carrier appeared by their attorney, James W. Fletcher, Jr., of Kansas City, Missouri.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held March 29, 2011, with attachments, and the documents filed of record in this matter.

ISSUE

Did claimant suffer personal injury by accident which arose out of and in the course of his employment with respondent? Respondent contends that claimant either did not suffer the accident claimed or, if he did, it occurred as claimant was preparing to come to work. Therefore, the "coming and going" exclusion of K.S.A. 2010 Supp. 44-508(f) would prohibit the award of benefits in this matter. Claimant contends that travel was an intrinsic

part of his job and the "going and coming" rule does not apply. Or, even if the rule applies, the task being performed by claimant at the time of the accident constituted a special hazzard associated with his job with respondent. Finally, claimant contends that the task of cleaning the ice and snow off the vehicle was part of his job. Therefore, this task constituted a portion of his job duties and the accident occurred both out of and "in the course of" his job with respondent.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant was employed by respondent as an area manager. Respondent company constructed and maintained railroad lines throughout parts of Kansas, Missouri, Iowa, Nebraska, Oklahoma and Texas. Claimant regularly traveled on his job, but his base was at the company's Kansas City office in Gardner, Kansas. Claimant was the supervisor of that office and was provided a company truck for his use. The truck regularly stayed at claimant's home. Claimant's travel schedule varied, with him being on the road for one to two weeks at a time and, at times, in the office for one to two weeks at a time. At times, claimant would leave from the office to go to a job and, at times, he would leave directly from his home. He regularly drove the company truck when traveling for respondent.

Claimant testified that the Kansas City office was closed due to adverse weather from Monday, January 10, to Wednesday, January 12, 2011. Claimant was contacted on the night of January 12 by Alan McElhaney, claimant's supervisor from the Broken Arrow, Oklahoma office, and told to be in the office on Thursday, January 13, 2011.

The morning of January 13, 2011, claimant attempted to drive the company truck to the office. However, a winter storm had covered the truck with ice and snow. When claimant attempted to free the truck, he was unable to do so. As claimant was working to free the vehicle, he slipped on the ice and snow, falling, catching his right arm between the floor and the door jam. Claimant suffered injuries to his right upper extremity, neck, low back and right knee. Claimant was unable to free the company vehicle, so he borrowed his wife's Hummer and drove 17 miles from his house in Eudora, Kansas, to the office to meet Mr. McElhaney. Shortly after arriving at the office, claimant and Mr. McElhaney met. At that time, claimant was advised that his job with the company was being terminated. The reason given was claimant's overall performance.

Claimant left the office with Robert Reigle, respondent's superintendent, after the termination and, with the help of Mr. Reigle and a friend of claimant's, was able to free the company truck from the snow and ice. He then drove the truck out of his driveway and left it for the company to retrieve, as he had been requested. Claimant testified that if he had not been contacted by the company, he would have left the office closed on January 13, 2011, as the weather remained poor.

Claimant sought medical treatment at the Concentra Medical Center in Olathe, Kansas, on January 17 and 21, 2011. He was diagnosed with a right upper arm strain and shoulder impingement and a lumbar sprain/strain.

Claimant had asked two employees to come into the office on January 13. Robert Reigle and Mary Ann Cisco, respondent's office manager, were at the office when Mr. McElhaney arrived. Claimant acknowledged that he did not mention the truck incident or the injury to either of them on the date of his termination. Claimant testified that it was company policy to report an injury within 24 hours of an accident. Claimant testified that he tried to contact Manny Leal, in respondent's human resources department, the afternoon of the incident. Claimant finally contacted Mr. Leal at about 6:00 p.m. the night of the injury.

At the preliminary hearing, claimant acknowledged that the claim for the knee injury was not being pursued. However, claimant was having difficulties with both shoulders, and both hands were going numb at night. Additionally, claimant was experiencing low back pain. Claimant testified that his left shoulder and left hand were bothering him at the time he went to the doctor on January 21. However, neither the medical report from January 21, 2011, nor the Application For Hearing, Form K-WC E-1 (E-1), filed on January 26, 2011, contain mention of the left hand or shoulder.

When Mr. Reigle testified, he noted that the office had been closed on Monday and Tuesday of the week in question, but was open on Wednesday. When claimant arrived at the office on the date of the accident, he did not mention an injury to Mr. Reigle, nor did he appear to be injured. When they went to claimant's house to retrieve the company truck, the driveway was slick. Mr. Reigle saw claimant slip on one occasion. In fact, Mr. Reigle had to be careful that he did not fall. He did note that the company truck appeared to be covered with snow.

Alan H. Mantegna, claimant's replacement, was present at the time claimant was terminated. He was asked if he noticed claimant displaying any physical distress. He said no. He testified that he later saw claimant loading what looked like a tire into the Hummer. This was shortly after the termination incident, although the exact date is not clear.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[1]

[1] K.S.A. 2010 Supp. 44-501 and K.S.A. 2010 Supp. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[2]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[3]

The record is uncontradicted that claimant was provided a company vehicle for business use. That vehicle stayed with claimant both while on the road and when claimant was at his home. This would necessitate that, if weather conditions dictated, claimant would have to clean the vehicle of ice and snow before it was driven on any road beyond his driveway.

> The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer.[4]

The Board was asked to address a situation similar to this in *Peck*.[5] In *Peck*, the claimant, a Kansas highway patrolman, was proceeding from his house to his patrol car to clean the ice off of the windshield. The claimant in *Peck* fell on the ice before he reached the patrol car. The Board ruled that Peck had not suffered a personal injury by accident arising out of and in the course of his employment as the ice he encountered was a general risk encountered by all members of his community at the time of the storm. The Board found that the claimant was on his way to assume the duties of a highway patrolman at the time of the fall and had not yet begun his employment as he had yet to actually reach the vehicle.

Peck is distinguishable from the instant matter. Here, claimant had reached the company vehicle and was laboring to clean the ice and snow off the truck and free

---

[2] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[3] K.S.A. 2010 Supp. 44-501(a).

[4] K.S.A. 2010 Supp. 44-508(f).

[5] *Peck v. State of Kansas*, No. 225,064, 1998 WL 780879 (Kan. WCAB Oct. 29, 1998).

it from its weather-created confines. The slip and fall and the resulting injury stemmed directly from claimant's labors on the vehicle. Thus, the accident occurred, not while claimant was going to or coming home from work. Instead, it occurred while claimant was performing a necessary function of his job, a task which benefitted both him and respondent.

This Board Member finds that claimant suffered personal injury by accident which arose out of and in the course of his employment with respondent. The award of benefits from the preliminary hearing is affirmed.

Respondent disputes whether the accident even occurred as claimant described. In this case, several witnesses testified before the ALJ. The Order specifically finds claimant to be a credible witness. As there was no witness to this accident, other than claimant, there is no way to contradict claimant's allegations of an accident and resulting injury. While respondent's witnesses deny any outward signs of injury on the date of claimant's termination, that is not necessarily controlling in this situation. Obviously, claimant's mind would have been on other more pressing matters with the sudden termination of his employment. His failure to mention the accident is not fatally decisive in this instance. This Board Member finds that claimant has satisfied his burden of proving that he sustained a work-related accident and resulting injury which arose out of and in the course of his employment with respondent. The award of benefits by the ALJ is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[6] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has proven by a preponderance of the credible evidence that he sustained an accidental injury which arose out of and in the course of his employment with respondent. The award of benefits from the preliminary hearing is affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Brad E. Avery dated April 6, 2011, should be, and is hereby, affirmed.

---

[6] K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this ____ day of May, 2011.

HONORABLE GARY M. KORTE

c: Michael J. Haight, Attorney for Claimant
James W. Fletcher, Jr., Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge